

**BOARD OF APPEALS CASE NO. 4825**

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**BEFORE THE**

**APPLICANT: Nextel Communications, Inc.**

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**ZONING HEARING EXAMINER**

**REQUEST: Special Exception to locate a  
communications tower in the Agricultural District  
(on remand from the Court of Special Appeals);  
2836-38 Forge Hill Road, Bel Air**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 4/24/02 & 5/1/02**

**HEARING DATE: June 19, 2002**

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**Record: 4/26/02 & 5/3/02**

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## **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Nextel Communications, Inc., is requesting a special exception approval to locate a communications tower in an AG/Agricultural District, pursuant to Section 267-53I(4)<sup>1</sup> of the 1998 Harford County Code.

### **PROCEDURAL HISTORY**

The application was originally filed in this case on April 13, 1998. Hearings on the matter were held before the Hearing Examiner on August 19, 1998. During the Hearing, Ms. Lisa Nowakowski attempted to participate in the proceedings and object to the special exception requested by the Applicant. The Hearing Examiner denied Ms. Nowakowski standing to participate in the hearing. On October 5, 1998, Hearing Examiner Hinderhofer issued his decision to deny standing to Lisa Nowakowski and to allow the special exception for construction of the proposed communications tower. The Board of Appeals affirmed the decision of the Hearing Examiner on March 9, 1999 by a vote of 5-0. On August 31, 1999, the Circuit Court for Harford County affirmed the decision of the Board of Appeals.

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<sup>1</sup> 267-53I(4) were the only requirements found in the Harford County Code relative to Communication Towers at the time of the original application filed in this case on April 13, 1998 and continues to be the law applied to the application on remand.

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On March 20, 2001, in an unreported decision, the Maryland Court of Special Appeals reversed the decision of the Harford County Board of Appeals and remanded the case to the Board, stating that,

- “(2) The Board of Appeals and any designated hearing Examiner representing the Board shall grant to Lisa Nowakowski standing to participate in any proceeding involving the application request for a Special Exception.”**

The case was set in before the hearing Examiner on January 28, 2002. Motions were filed and briefs submitted on two issues. First, whether the remand hearing would be de novo and secondly, what law applies.<sup>2</sup> On October 1, 2001, the Hearing Examiner ruled that the hearing would proceed de novo and that old ordinance Section 267- 53 I(4) would apply for reasons set forth in the Hearing Examiner’s memoranda opinion, dated October 1, 2001. Subsequently and prior to the January 28, 2002 hearing date, Applicant’s counsel alerted the Hearing Examiner to a new decision by the Maryland Court of Appeals that Applicant’s counsel believed should be considered by the Hearing Examiner. The Hearing Examiner treated this request as one for reconsideration of the earlier motions and requested supplemental briefs. Counsel was notified that the Hearing Examiner declined to alter his earlier decision based on this supplemental briefing and a new hearing commenced on June 19, 2002. At the onset of the hearing, the Hearing Examiner restated his position that the hearing would proceed de novo pursuant to the 1998 statute.

The Hearing Examiner notes that Ms. Nowakowski was represented by counsel throughout the proceedings of this case and was able to fully participate as a party to these proceedings in accordance with the Order of the Court of Special Appeals.

Mr. Sean Hughes appeared and stated that he is the zoning manager for Nextel. He assists Nextel in evaluating potential site locations. He testified in the 1998 hearing before the Hearing Examiner in this case. He stated that the tower was built after the 1998 hearing pursuant to a building permit issued by the Department of Planning and Zoning.

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<sup>2</sup> Between the time of the initial Board of Appeals hearing on August 19, 1998 and the filing of the Court of Special Appeals decision on July 27, 2001, the Harford County Council enacted Article VIII. A entitled, “Telecommunications Facilities”, Sections 267-53.1 through 267-53.7. This new ordinance represented a comprehensive and wholesale change to the County Zoning Code respecting telecommunication towers.

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The tower is currently erected and operating and is shared by two other communication companies, Sprint and Voicestream. The witness indicated that in 1998 and at present, computer modeling indicating a need for a communications tower at this location. Nextel leases the land from Mr. Wilson pursuant to a 5 year, renewable term lease. The witness stated that the tower is constructed in accordance with American National Standards Institute (ANSI) requirements. Other than the protestant, Lisa Nowakowski, Nextel has received no complaints regarding the tower or its location. The existing tower is 196 feet in height and meets the requirement that the distance to the property line be at least the height of the tower plus 10 feet. There are no aviation lights on the tower. The witness then went through the provisions of Section 267-9I of the Code entitled "Limitations, Guides and Standards". The witness opined as follows:

1. The number of persons living in the area or working in the area would be unaffected since it unmanned.
2. There is no traffic to and from the property except for routine once per month maintenance.
3. There is no water or sewer service.
4. Fire and break-in alarms are present and operating.
5. There is a lightning arrest present.
6. There are no impacts on sewer, garbage collection, fire, police, ambulance or other emergency or sanitary services.
7. It is not lighted in any way.
8. No odors, dust, vibrations or glare exist or are created by the tower.
9. The construction is in accordance with ANSI standards and meets generally accepted engineering principles.

The witness concluded that there is nothing different about this tower at this location than any other tower despite its location in an AG zone. On cross examination, the witness stated that two other communication companies are negotiating at present to co-locate on this tower. Additionally, the witness indicated that the closest tower to this one is between 2 and 3 miles away and would not be sufficient to provide the necessary coverage.

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Mr. Jules Cohen appeared and qualified as an expert radio frequency engineer. Mr. Cohen also testified at the 1998 hearing in this matter. Mr. Cohen indicated that he had an extensive background in radio frequency engineering and has been consulting in the area for many years. He was one of the engineers responsible for creating the RF standards used today by the Federal Communications Commission (FCC). Mr. Cohen actually measured the RF emissions from this tower and prepared a report to that effect. His study indicated that the emissions from this tower, in the aggregate, are less than 2.5% of the maximum allowed by the FCC for such a tower, well within the range of safety and allowability. Mr. Cohen went on to recite those sections of federal law that disallow a local zoning authority considering health effects of radio frequency emissions in denying the zoning approval of any particular tower.

Mr. Anthony McClune appeared as the representative of the Department of Planning and Zoning. Mr. McClune indicated that he, too, had participated in the 1998 hearing in this matter. In 1998, the Department of Planning and Zoning investigated the request of the Applicant and issued a Staff Report as part of the record of this case on August 10, 1998 in which the Department, recommending approval of the special exception, concluded that:

- (a) the Applicant's request met or exceeded all Code requirements, and
- (b) the request would have little or no adverse impacts on the surrounding community or the intent of the code.

Mr. McClune indicated that, in preparation for his testimony, he visited the site and nothing that he observed or that he learned about the tower alters or changes his earlier position that this tower, at this location, has no greater impacts associated with it than any other similar tower regardless of where it is located in the Ag/Agricultural zone. Mr. McClune indicated that his Department had authorized the building permit for the tower. Mr. McClune described the area as sparsely populated, rural legacy area with very limited development. He described the area's topography, vegetation and forestation and indicated nothing about the existing area leads to the conclusion that there is a greater impact here than anywhere else in the AG zone. In fact, according to the witness, rolling topography and mature forest stands limit significantly visual impacts associated with this tower compared to others.

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He admitted that no subsequent Staff Report had been prepared and stated he did not believe the Code required a supplemental Staff Report be prepared under the circumstances of the case. Mr. McClune ultimately concluded again that the request should be approved.

Ms. Lisa Nowakowski appeared and testified that she lives at 2413 Cool Spring Road. Her house is shown on a photograph marked as Applicant's Exhibit 10. Her house is 1.2 miles from the tower site. She has lived there 15 years. She stated that she is opposed to this tower because she fears the danger of radio frequency emissions to her health and the health of other community members. Additionally she thinks towers in general, and this tower in particular, are aesthetically displeasing and break up what is otherwise a beautiful landscape. Finally, she indicated that MD Route 543 is a scenic by-way and this tower is visible from that road which she thinks is inappropriate. The witness went on to state that she does not use a cellular phone.

Following the testimony of Ms. Nowakowski, Mr. McClune was recalled as well as Mr. Hughes. No additional testimony of a nature material to these proceeding resulted, however.

### **CONCLUSION:**

The Applicant, Nextel Communications, Inc., is requesting a special exception approval to locate a communications tower in an AG/Agricultural District, pursuant to Section 267-53I(4)<sup>3</sup> of the 1998 Harford County Code.

Harford County Code Section 267-53I(4) provides:

**"Towers, Communication and Broadcasting. These uses may be granted in the AG, B2 and B3 District, provided that the setback of the tower from all property lines shall be equal to the height of the tower plus ten (10) feet."**

It is undisputed that the Applicant's proposed tower meets the requirements set forth in Section 267-53I(4) of the Harford County Code.

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<sup>3</sup> 267-53I(4) were the only requirements found in the Harford County Code relative to Communication Towers at the time of the original application filed in this case on April 13, 1998 and continues to be the law applied to the application on remand.

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The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:

“...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption*. The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (Emphasis in original).

The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:

“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. At 15, 432 A.2d at 1327.

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Considering the “Limitations, Guides and Standards” set forth in Section 267-9I of the Code, the Hearing Examiner finds no impacts associated with this tower in that regard that could be considered material or even consequential. The only possible adverse impact of this tower is its visual impact and, following the guidance of Schultz, the Hearing Examiner concludes that this tower at this location will not have any adverse impacts different from or greater than any other similar tower located at some other place within the AG zone. In fact, because of the topography, the existing mature stands of forest and vegetation, any potential impacts associated with this tower are likely to be less than those associated with other towers located in the AG zone.

For the foregoing reasons, the Hearing Examiner recommends approval of the Applicant’s request.

Date     JUNE 27, 2002

William F. Casey  
Zoning Hearing Examiner